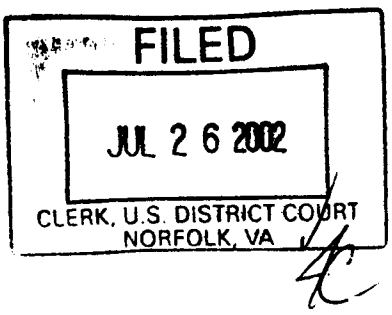
IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION



YASER ESAM HAMDI,

ESAM FOUAD HAMDI, As Next Friend of Yaser Esam Hamdi,

Petitioners,

v.

DONALD RUMSFELD
Secretary of Defense

COMMANDER W.R. PAULETTE,
Norfolk Naval Brig

Respondents.

CASE NO. 2:02CV439

PETITIONER'S RESPONSE TO RESPONDENTS' MOTION FOR RELIEF FROM THIS COURT'S JULY 18, 2002, ORDER

Conceding that the Rule 26 disclosures "may not be terribly intrusive," (Respt's Mot. at 14), Respondents have supplied initial disclosures while maintaining at the same time that such disclosures are not required in habeas proceedings. The disclosures made by Respondents make Respondents' Motion for Relief unnecessary. Nonetheless, Petitioner is compelled to make clear that federal courts have ample authority to order such disclosures in habeas proceedings.

Federal Rule of Civil Procedure 26(a)(1) provides that "except in categories of proceedings specified in Rule 26(a)(1)(E), or *to the extent otherwise stipulated or directed by order*," a party must provide initial disclosures to other parties. Rule 26(a)(1) (emphasis added). Rule 26(a)(1)(E)(ii) provides that "a petition for habeas corpus or other proceeding to challenge a criminal conviction or sentence" does not trigger the automatic disclosure requirements set forth in Rule 26.

Citing *Department of Housing and Urban Development v. Rucker*, 122 S. Ct. 1230 (2002), Respondents argue that Federal Rule of Civil Procedure 26(a)(1)(E)(ii) exempts all habeas proceedings from Rule 26 initial disclosures. Specifically, Respondents argue that the word "or" establishes that the words "to challenge a criminal conviction or sentence" qualify only the words, "other proceedings." Respondents' argument contradicts their interpretation of Rule 26(a)(1), and is not supported by *Rucker*.

Federal Rule of Civil Procedure 26(a)(1) provides that initial disclosures are required "*except* in categories of proceedings specified in Rule 26(a)(1)(E), *or to the extent otherwise stipulated or directed by order.*" In response to the argument that Rule 26(a)(1) explicitly authorizes courts to order initial disclosures as "directed by order" even in cases exempted by Rule 26(a)(1)(E), Respondents contend that the words "directed by order" merely authorize courts to expand the list of exceptions set forth in Rule 26. (Respt's Mot. at 3 n.2). This argument makes sense only if the word "except" in Rule 26(a)(1) qualifies the words "to the extent otherwise stipulated or directed by order" following the disjunctive "or" in Rule 26(a)(1). In other words, Respondents maintain that the word "or" permits a qualification in Rule 26(a)(1), but does not permit a qualification in Rule 26(a)(1)(E)(ii).

Moreover, the construction rejected in *Rucker* would have resulted in a "nonsensical reading." 122 S. Ct. 1234. Here, construing the words "to challenge a criminal conviction or sentence" as modifying "a petition for habeas corpus" would exempt those habeas proceedings for which explicit rules have been promulgated–§ 2254 and § 2255 proceedings–from Rule 26(a)(1)'s requirements, while at the same time allowing courts to require such disclosures in cases for which no rules have been provided, namely petitions for habeas corpus filed pursuant to § 2241.

Regardless of the construction of Rule 26, however, Respondents do not deny that federal courts are "expressly" authorized by virtue of the All Writs Act to "fashion appropriate modes of procedure [in habeas proceedings], by analogy to existing rules or otherwise in conformity with judicial usage." *Harris v. Nelson*, 394 U.S. 286, 299 (1969). While Respondents correctly state that

discovery in habeas proceedings is permitted only upon a showing of "good cause," that standard has been met in this case. Specifically, the Petition alleges that Petitioner Hamdi is an American citizen who has been imprisoned, potentially indefinitely, on no criminal charge. Without basic discovery in this case, Respondents would remain free to detain any American citizen alleged to be an enemy combatant solely "on the government's say-so," an outcome that is unacceptable. *Cf. Hamdi v. Rumsfeld*, No. 02-439, slip op. at 12.

Respondents also liken this case to review of an administrative determination. In the administrative context, however, deference to administrative determinations is the result of congressional delegation of authority to the agency. *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990). Deference is not warranted when "[t]he law in question . . . is not administered by any agency but by the courts. " *Crandon v. United States*, 494 U.S. 152, 177 (1990) (Scalia, J., concurring in judgment).

According to Respondents, their explanation of their application of the law of war to Mr. Hamdi should end these proceedings. *See* (Respt's Response to Pet. and Mot. Dismiss at 7, 15-16). Aside from the question whether international law is sufficient to justify Mr. Hamdi's indefinite detention, international law, and specifically the laws of war, are not administered by any agency of the United States. While this Court is certainly aware of the concerns outlined by the Court of Appeals for the Fourth Circuit in its recent opinion, those concerns have nothing in common with the deference due in cases involving judicial review of agency decision-making.

Finally, Respondents contend that this Court lacks jurisdiction because the Fourth Circuit has yet to issue its mandate in connection with Respondents' interlocutory appeal of this Court's June 11, 2002, Order. As explained in Petitioner's Response to Respondents' Refusal to File Rule 26 Disclosures, the fact that the mandate has not yet issued is no bar to this Court's discovery orders. (Pet. Resp. Refusal to File Rule 26 Disclosures at 2-3).

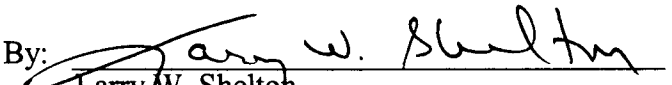
For the first time, however, Respondents have also noted that the Fourth Circuit entered a stay of all proceedings pending appeal in this matter. (Respt's Mot. at 2 n.1). Respondents have also

cited Appellate Local Rule 8, which provides: "An order granting a stay or injunction pending appeal remains in effect until issuance of the mandate or further order of the Court and may be conditioned upon the filing of a supersedeas bond in the district court." 4th Cir. Local Rule 8.

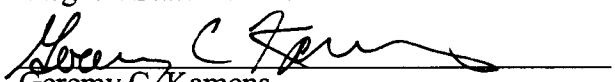
Appellate Local Rule 8 acknowledges that a stay may dissolve upon "further order of the Court," and the Fourth Circuit's July 12, 2002, opinion may constitute such an order. Nonetheless, should this Court express concern that the Fourth Circuit's stay remains in effect, Petitioner is prepared to request that the Fourth Circuit issue an order that explicitly dissolves the stay entered on June 14, 2002.

Respectfully submitted,

FRANK W. DUNHAM
Federal Public Defender

By: 

Larry W. Shelton
Supervisory Assistant Federal Public Defender
Virginia State Bar No. 15205



Geremy C. Kamens
Assistant Federal Public Defender
Virginia State Bar No. 41596

Office of the Federal Public Defender
150 Boush Street, Suite 403
Norfolk, Virginia 23510
(757) 457-0800

CERTIFICATE OF SERVICE

I certify that on this 26th day of July, 2002, a copy of the foregoing was hand-delivered to Lawrence R. Leonard, Managing Assistant United States Attorney, at the Office of the United States Attorney, Eastern District of Virginia, Norfolk Division, World Trade Center, 101 W. Main, Suite 8000, Norfolk, VA 23510.

Geremy C. Kamens
Assistant Federal Public Defender